87-1875

No. ____

IN THE

Supreme Court of the United States

October Term, 1987

OTIS L. LEE
Petitioner,
v.
THE ALBEMARLE COUNTY, VIRGINIA SCHOOL BOARD, et al.,
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. IN THE LOWER DISTRICT COURT'S ORDER OF OCTOBER 29, 1986 GRANTING THE DEFENDANTS MOTION FOR SUMMARY JUDGMENT, CAN A PUBLIC SCHOOL SYSTEM TAKE A TENURED TEACHER'S CONTINUING CONTRACT EMPLOYED FOR TWENTY-TWO YEARS IN VIOLATION OF THE SUBSTANTIVE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION WITHOUT A TRIAL WHEN THE TENURED TEACHER ALLEGED IN HIS COMPLAINT THAT HIS FIRING WAS MOTIVATED BY PREJUDICE, HATRED, BIAS, AND HYSTERIA AND HE FURTHER ALLEGED HIS PROCEDURAL DUE PROCESS IN A STATE GRIEVANCE PROCEDURE WAS TAINTED PROVEN BY AFTER DISCOVERED EVIDENCE?

2. WAS THE DISTRICT COURT IN ERROR TO FIND THAT THE DEFENDANTS BELOW ENJOYED IMMUNITY IN THE DISMISSAL OF MR. LEE?

3. WAS THE DISTRICT COURT IN ERROR TO GRANT SUMMARY JUDGMENT ON MR. LEE'S CLAIM OF RACIAL DISCRIMINATION?

PARTIES

The parties to this action are Otis L. Lee, former teacher, principal and administrative assistant to the Superintendent of Schools, the Albemarle County of Virginia School Board, Superintendent Carlos Y. Gutierrez, School Board member Englar M. Feggans, Principal Carolyn S. Gaines, teacher Harriet L. Scott, administrative assistant Wilbert T. Lewis, Jr., Ella C. May, Christine N. Garrison, the Albemarle County Fact Finding Panel, the latter three being necessary parties.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioner, Otis L. Lee, respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fourth Circuit entered September 14, 1987, petition for rehearing and suggestion in banc denied February 17, 1988, and evolving from the judgment of the United States District Court for the Western District of Virginia at Charlottesville Virginia by Ordered entered October 29, 1986.

OPINIONS BELOW

Mr. Lee filed his Complaint in 1984 which was decided by Order granting a motion for summary to a second amended

complaint on October 29, 1986 (Appendix at page 10.) (Hereinafter App., pg.) A memorandum opinion dated October 29, 1986 supported the order. (App., pg. 12.) (The summary judgment motion of the original complaint was denied by Order of the District Court Dated January 1, 1985. (App., pg. 36.)

On appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed the District Court, decided September 14, 1987 by unpublished opinion. (App., pg. 3.) Mr. Lee's Petition to Rehear with suggest for rehearing en banc was denied by the Court's Order dated February 17, 1988. (App., pg. 1.)

JURISDICTION

The Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment 14

Section 1. Citizens of the United States. ... No State shall make or enforce any law which abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONGRESSIONAL STATUTES INVOLVED

42 U.S. CODE

§1981. Equal rights under the law.
All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and

proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner, Otis L. Lee, formerly a twenty-two year faithful school employee of the Albemarle County Virginia School System (Hereinafter "the School System") obtained tenure by his execution of a continuing contract with the School System and Albemarle School Board dated June 12, 1972 as a principal of McIntire Elementary School.

He was subsequently assigned in the 1982-83 school session to the Central Office as a special administrative assistant to the Superintendent for twelve months in his employment at a salary of $29,618.00 plus the employee's share of FICA, Virginia Supplemental Retirement and State Life Insurance costs for the school session 1982-83. Soon thereafter, he was dismissed from the School System after successfully

administering a Minority Task Force to hire and place black teachers. (Supra.)

In 1982, Superintendent Carlos Y. Gutierrez with the blessing of the School Board decided to hire for the 1982-83 school session solely all black teachers. He created on his authority and direction a Minority Task Force, a school committee of mostly black teacher employees. Naming Otis L. Lee as their Chairman, Superintendent Gutierrez testified in pre-trial depositions that Mr. Lee was the senior black administrator " ... [and] having some discussion with the Board for want of a better word, [Mr. Lee had] the right to operate in that position." (App., pg. 44.) The Superintendent testified in pre-trial depositions that the primary focus of his Task Force was to dispel "the

allegations ... that black teachers will not come to Albemarle County." (App., pg. 45.) The Task Force with Mr. Lee as Chairman recommended with the Superintendent to the School Board that all new 1982-83 teachers hired were to be black. (App., pg. 45.)

In so doing, the Superintendent had given Mr. Lee final authority to offer contracts to the qualified black applicants. In pre-trial depositions, the Superintendent testified that Mr. Lee had the "final authority" on proposing the black minority teachers to be hired by the School Board. (App., pg. 46.) Superintendent Gutierrez in the pre-trial depositions[1] testified that the Minority

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[1] Hereinafter all testimony noted in this Petition is from pre-trial depositions taken of the defendants which on filing the district court chose not to open or consider deciding the case solely on the grievance panel record alone.

Task Force once in place was not popular politically or otherwise in the School System because in his opinion "there's a great amount of **latent racism** still in existence in our organization." (Emphasis added, App., pg. 46.) He also related in his deposition that inherent problems in the Task Force existed.

The Superintendent had "the feeling there were some professional jealousies or differences of opinion about that" toward Mr. Lee as chairman in such an important role. (App., pg. 47.) He also noted that he experienced "resistance" when placement began by Mr. Lee, himself, and personnel director Tom Hurlburt. (App., pg. 47.) Principals would call and say they preferred one person over another "and I'd say well I'm sorry, but that person is going

to be placed there. I would back the Task Force on its placement." (App., pg. 47.) He noted nonetheless the jealousies and complaints of the principals created a weakness in the plan of the Task Force. Mr. Lee, and the personnel director, Tom Hurlburt, were "besieged by complaints from principals." (App., pg. 48.) Mr. Lee, as chairman, and Mr. Hurlburt as personnel director took the brunt of the complaints.

Mr. Lee, as the chosen Chairman of the Task Force, nonetheless met no opposition from the School Board, but on being terminated post facto the hiring of his recommendations, the School Board determined in its reasoning to dismiss Mr. Lee from employment that Mr. Lee caused the so called "problems" and "endangered the success of the program". (Everyone of Mr. Lee's recommendations

were officially approved by the School Board at a duly constituted public hearing on May 10, 1982, Mr. Lee being fired by letter of the School Board dated June 29, 1983.) (App., pg. 39.)

The Task Force and Mr. Lee on May 10, 1982 as a matter of public record were publicly commended for doing an excellent job and the Task Force was thereafter disbanded. On July 12, 1982, Superintendent Gutierrez wrote and place in Mr. Lee's file a lavish letter of praise:

Dear Otis:

> As I complete my first year as Superintendent in the Albemarle County, I want to thank you for the support and assistance that you have given me in your role as Administrative Assistant to the Superintendent. Without question, the high point in the year for you and one of the very high points for me, has been the accomplishment of the goal of increasing the number of minority of professionals in our division and in beginning the task of balancing the distribution

> of minority professionals among our twenty-one buildings. **You deserve most of the credit for causing this goal to be accomplished**. I appreciate the work that you and the task force have done toward that end. (Emphasis added.)

In August of 1982, Mr. Lee's problems began. Information came to Superintendent Gutierrez about one of the black hirees, Mr. Holmes, an elected and fully qualified minority math teacher applicant, a math teacher approved of by the personnel director, Mr. Hurlburt and so approved by the School Board at its May 10, 1982 public meeting. Dr. Gutierrez testified in a pre-trial deposition that he received information Mr. Holmes was incompetent from School Board member James Walker.

> "Well, as I recall, Dr. Walker was outraged because he had supported the Minority Task Force and had believed what we had told him about going out and getting good people and when he heard this name, he just flew off the handle and let me have it with both barrels."

Ultimately, after considerable discussion, Dr. Gutierrez learned Mr. Holmes was accused of being an alleged homosexual. (Mr. Holmes would later categorically deny the same.) Thereupon Dr. Gutierrez ordered Mr. Lee that Mr. Holmes had to go. "I think I told him [Mr. Lee] I didn't want the man [Mr. Holmes] in the Division." (App., pgs. 44 - 51 see Testimony of Dr. Gutierrez regarding the people recommended to the Board and approved by the Board.)

Mr. Holmes at Mr. Lee's request, to avoid unwanted publicity that he deemed utterly false, tendered his resignation after being advised of Dr. Gutierrez's concerns and demands. Mr. Lee at the Superintendent's direction and because a School Board member complained, retrieved the contract from Mr. Holmes.

With other shifting and placement in the School System of teachers and Mr. Holmes resignation, a teacher vacancy developed at the B. F. Yancey School of which Mrs. Carolyn Gaines, a party defendant to this action, was the principal. Because Mr. Jenkins, a Minority Task Force hiree, requested transfer from Mrs. Gaines' school a vacancy had to be filled.

Unaided, Mr. Lee would have chosen Harriet Scott. Mrs. Gaines was at her request given an unaided opportunity to look at two teacher applicant folders. On return, Mrs. Gaines also chose Harriet Scott. Mr. Lee called Miss Scott at her home to announce to her an opening. Miss Scott immediately accepted the teaching post.

Miss Scott in so doing a week or so before the school was to open, asked

Mr. Lee if he knew where she could find an apartment in Charlottesville. He replied, being a property owner and having housed many a black teacher through his years of employment and assisting black teachers, a fact well known : "Harriet, I have an apartment if you want it. I'll be happy to show it to you when you get here and you can make the decision." (Lee Fact Finding Panel Testimony.) (App., pg.60.)

Harriet Scott, a 23 year old teacher, therafter soon arrived in Charlottesville on September 18, 1982, a Saturday and a non-school day with her mother and some relatives assisting her. On arriving she called Mr. Lee and asked to see the apartment that he had. He told her where to go and he met her at the apartment.

After inspecting with family members

the apartment offered to her, she alone signed a lease with Mr. Lee to rent the apartment and her mother made the security deposit. Mr. Lee informed her and her mother that the apartment had been newly painted, the painters hadn't cleaned up, and he would provide first of the week a cleaning, a stove and refrigerator. (Later confirmed in pre-trial depositions by all parties.)

Thereafter, on her first school day, Miss Scott, her principal (Carolyn Gaines), and others, including School Board member Mr. Feggans, went to Mr. Lee's rented apartment. Beforehand, Mr. Feggans and a Mr. Plotnick, a former political aide to a member of the Board of Supervisors and a former employee of the local newspaper, had called a housing inspector and a local news reporter to come to the apartment.

These individuals proceeded to demean the apartment and proffered to the reporter that Miss Scott had been pressured into the apartment.

From those orchestrated meetings, the local tabloid, The Daily Progress with a circulation in excess of 85,000 subscribers in the community, therafter printed a front page story on September 22, 1982 with the sensational headline: **"Teacher Felt Pressured To Rent."** The article included a selected picture of an unimproved kitchen area of the apartment (that Mr. Lee was in the process of delivering a new stove and refrigerator to) with the news caption "Teacher Rented House From School Official Sight Unseen." (App., pgs. 66-72.)

This was the beginning of a series of sensational local newspaper articles that eventually announced that Mr. Lee,

before he had the opportunity to respond by legal grievance proceedings, had been "DISMISSED". (App., pg. 66.)

Approximately two days after the first publication, Dr. Gutierrez testified in depositions on return from out of town that he spoke with the School Board Chairman Jessie Haden. "And she informed me of the [first] article and was I might say, hopping mad about the whole thing ... as I recall, she and I had words." He suggested to Mrs. Haden that the School Board members should stay out of it. Other School Board members nonetheless contacted Dr. Gutierrez who described them as "embarrassed that the school division would be called to the public attention through something like this."

By letter dated (Friday) September 24, 1982, approximately two days after

the first new story, the Superintendent suspended Mr. Lee from employment. He then went public again announcing his decision to the same reporter who had written the first article. This fact of a suspension was similarly reported in the September 25, 1982 issue of the local newspaper, with direct quotations emanating from the Superintendent and from the vice chairman of the School Board. The newspaper for October 6, 1982 carried the sensational headline: **"School Official Dismissed"**[2] over a story quoting the Superintendent as saying that "a dismissal action" against Mr. Lee has been taken. At this time, no state mandated grievance proceedings had even begun with Mr. Lee, the tenured contract employee. Only after the news articles under a letter dated October 22, 1982 did the

[2] (App., pg. 66.)

Superintendent first reduce to writing as required by state law addressed to Otis Lee announcing REASONS FOR DISMISSAL OF OTIS LEE. Pursuant to §22.1-309 of the Code of Virginia, as was his right, Mr. Lee with the first opportunity requested a hearing before a Fact Finding Panel, as provided in §22.1-312, Va. Code.

The Fact Finding Panel was thereafter emplaced and after adducing a massive volume of testimony from all corners of the School System, the Panel delivered its opinion. (App., pg. 36-37.) Its 2-1 recommendation (App., pg. 38.) concluded by two panel members, Mr. Landin and Miss Garrison, specifying that Mr. Lee's conducting of personal business on a regular basis during the course of his regular employment as assistant to the Superintendent constituted a conflict were "actions

[for] ground for dismissal." (App., pg. 38.)

The dissent, Miss May, panel member, was joined by the other two unanimously agreeing that Lee's personal business activities were conducted during working hours, occurred over a period of time, were not concealed by Otis Lee, were a greater or lesser degree known to officials in the School System and were not specifically addressed as they occurred. (App., pg. 38.)

She "as the remaining member" felt while those actions were improper, they did not warrant dismissal. She opined that in that such actions were not addressed as they occurred while to a greater or lesser degree they were known to all, that Lee be suspended for 90 days without pay and in that time effectuate his retirement.

Shortly thereafter without further notice to Mr. Lee, on June 29, 1983, the School Board accepted the two panel members' recommendation to dismiss and dismissed Mr. Lee. (App., pgs. 39-40.) Summarizing their decision, the firing was based on Mr. Lee intermixing his private business affairs and public responsibilities 1) "to the serious detriment of the School System" and 2) that Mr. Lee "improperly hired and placed at least one teacher (unidentified) in his position as Chairman of the Special Task Force for Minority Hiring which greatly endangered the success of that program." (App., pg. 39.)

MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED BELOW

Mr. Lee subsequently filed his federal complaint in the United States District Court for the Western District of Virginia alleging violations of his

Fourteenth Amendment rights to substantive due process and abridgements of his rights, privileges, and immunities under 42 U.S.C. §1981 and §1983. He also alleged a conspiracy under 42 U.S.C. §1985.

First denying the defendants motion for summary judgment on the original complaint, the District Court requesting new counsel to make concise the original complaint, a first and second amended complaint were filed alleging the same claims inclusive of the deprivation and taking of Mr. Lee's tenured continuing contract under the colour of state law and on the basis of extreme bias, bad faith, hysteria, inflammatory news articles made <u>prior</u> to emplacement of any meaningful and non-tained employer / employee grievance process. The effect was a pre-disposed School System's,

School Board's and the community's pre-judgment adverse to Mr. Lee's good name in his community thus depriving him of his liberty.

REASONS FOR GRANTING THE WRIT

ONE

Without the intervention of this highest Court in the land, the firing of Mr. Otis Lee, tenured contract teacher, in violation of the substantive due process clause of the Fourteenth Amendment of the Constitution stands without redress and the deprivation was obtained by the wrongful granting of summary judgment depriving Mr. Lee of his day in Court by trial. The result is a grave injustice and precedent offensive to the Constitution and Rights, Privileges, and Immunities guaranteed to all citizens. Mr. Lee seeks reversal and a remand of the case for trial.

The tainted, biased, hysterical, and unlawful firing of Mr. Lee can readily be seen in massive pre-trial depositions[3] obtained on filing his Complaint to regain his good name in his community, his job and or damages for the deprivation

[3] The same were never opened or considered. See Supra.

of the same in violation of the United States Constitution. By the District Court's granting of summary judgment, affirmed by the U. S. Fourth Circuit, Mr. Lee's right to prove the same in an adversary evidentiary hearing will be forever taken from him and he will have lost a long time earned property for impermissible constitutional reasons unless this Court intervenes.

A pre-trial deposition deponent, James Uttley, illustrates graphically the situation. Cleaning as a janitor in the basement of the apartment house of the apartment that newly hired teacher Harriet Scott had agreed to rent from Mr. Lee, Mr. Uttley overheard several people, purportedly on the day a School Board member (defendant Mr. Feggans) and school principal (defendant Mrs. Gaines) had caused a news reporter to

come to meet them at the apartment and he heard one of them say:

> "We're going to get that son of a bitch. We're going to get his job and get his money. We've got the son of a bitch now." (Pre-Trial Deposition of James Uttley, September 18, 1984.)

The growing and existing sentiment against Mr. Lee because of the jealousies and dislikes which arose against him while successfully performing as Chairman of the Minority Task Force are rampantly illustrated throughout the pre-trial depositions. The District Court gave the same no moment reasoning it had no obligation to do so if the Court could find sufficient evidence for dismissal under Virginia Code §22.1-307 to support a state statutory reason for dismissal.

With the sensational newspaper articles (App., pg. 66.) prompted by

a School Superintendent hounded by the press and arising out of School Board members bending his ears, Dr. Gutierrez's pronouncements and briefings nearly daily gained front page and front local news page coverage with sensational headlines as well before Mr. Lee was ever afforded his procedural rights of a state mandated grievance hearing, viz., for example, "Teach Felt Pressured To Rent House". (The Daily Progress, September 22, 1982); "School Official Probed On Conflict Of Interest". (The Daily Progress, September 24, 1982; "School Official Dismissed". (The Daily Progress, October 6, 1982.) In the September 24, 1982 article, the same reporter wrote quoting Superintendent Gutierrez:

> "Albemarle County School Superintendent Carlos Gutierrez said today that he is investigating Otis

L. Lee, his administrative assistant, for a possible conflict of interest violation and misuse of public trust." (The Daily Progress is the largest daily newspaper in the area with over 85,000.00 subscribers.) (App., pgs. 66-72.)

Before Mr. Lee officially received reasons for his suspension as required by Virginia law, the same reporter reported in the September 24, 1982 **"School Official Dismissed"** article, with a photograph of Mr. Lee, quoting the Superintendent again:

> Gutierrez said that several angles are being investigated. "There is the aspect of conflict of interest, doing business with an employee. There is the allegation that a public officer implied that there was a connection between a teaching job and renting an apartment. And there are other angles," he said. "I'm not just going to sweep this under the rug. I take the allegations very, very seriously. I'm conducting an intensive investigation, and I do intend to act very, very shortly."

The Fourth Circuit general rule in School Board / Teacher disputes when

it comes to a dismissal and a procedural mechanism such as a grievance panel is emplaced to guarantee procedural due process, that on being granted the grievance process, a teacher is not entitled to a de novo hearing if the School Board in its broad discretion can support with sufficient evidence a statutory authorized reason for dismissal. Johnson v. Branch, 364, F.2d 177 (4th Cir. 1966); in accord, Gwathmey v. Atkinson, 447 F. Supp. 1113 (E. D. Va. 1976).

In reliance on Johnson v. Branch, the District Court adopted the Fourth Circuit rule that the Court "may not usurp the discretionary power of the school board but must judge the constitutionality of its action on the basis of the facts which were before the Board and on its logic." Citing

Johnson v. Branch, Id., at page 181 (4th Cir. 1966). Stating it thus had a very limited review exercise, the District Court relied on Gwathmey v. Atkinson, 447 F. Supp. 1113, at 1117, (1976) that a de novo entitlement by the District Court wasn't available and "If this Court were required to look beyond the purported reasons for the School Board's action, then again, perhaps, there would be issues of fact remaining. But neither is this required of us under the scrutiny appropriate herein."

The District Court concluded under Wood v. Strickland, 420 U.S. 308 (1975), "all the plaintiff has standing to ask of the Court here is to determine whether there was [any] evidence before the School Board supporting its decision." Believing it could find the same, the

District Court granted summary judgment and did not even bother to open and consider the evidence gathered in pre-trial discovery pursuant to Mr. Lee's Complaint. Much of his discovery could be classed as after discovered evidence inclusive of but not limited to factual evidence of hatred and bias toward Mr. Lee within the School System, that latent racism was still present in the School System, and that allegations of a tainted grievance panel existed.

Virginia Code §22.1-307 (App., pg. 61 .) lists when teachers may be dismissed under Virginia law, viz., incompetency, immorality, noncompliance with school laws and regulations, disability as shown by competent medical evidence, conviction of a felony or a crime of moral turpitude, "or other just cause". Mr. Lee's dismissal was

not supported by any of the specific enumerated reasons as none could be found or supported.

However, the District Court underlined the latter language ("or other just cause") and seized upon this ambiguous terminology as fitting the sufficient evidence the School Board advanced as grounds for dismissal that it "acted well within the limits of its discretion and had ample evidentiary support for its action" citing their reason that Mr. Lee intermixed his private business affairs and his public responsibilities to the serious detriment of the School System and Mr. Lee improperly hired and placed at least one teacher in his position. Those two reasons given by the School Board, by the evidence of pre-trial depositions, are totally contradicted, suspect,

possibly unlawful and sufficiently controverted to make the granting of summary judgment in this cause, when weighed under all the circumstances, a manifest injustice.

First, Mr. Lee was never given notice that his outside of school business activity in which he had engaged for years, which outside school jobs Dr. Gutierrez testified was common among no less than 65% of his teachers, would ever cause him to be dismissed without first bringing some enacted school policy or notice that the same was a dismissable offense to a tenured continuing contract employee with vested rights. Mr. Lee's affidavit filed in opposition to the motion for summary judgment stated that any number of school officials had outside property interests and attended to them during school hours on a free moment,

a fact well known throughout his employment. (App., pg. 53 .)

The School Board in its reason given never identified how Mr. Lee's outside activity was a "serious detriment" to the School System when many others were doing outside activities during school hours including former Superintendents. His dealings with Harriet Scott seeking an apartment on a short notice on a non-school day that saw her after a long inspection with her mother lease a nice apartment in a nice neighborhood can only be the surmised "serious detriment" since it was not given and in pre-trial depositions, Harriet Scott testified that Mrs. Gaines had pushed complaints and that she really didn't know what was going on. (See Apartment, App., pg. 68)

Regardless, as the panel noted

unanimously, to a greater or lesser degree, all of Mr. Lee's activities (which he swore were very limited during school hours) were widely known, condoned and never addressed nor ever concealed to the School System. (Emphasis added.) Over a period of 23 years, he had wisely invested in properties and was well known for his business enterprises in real estate outside of school. He had in helping to integrate the Albemarle County School System following Virginia's "massive resistance" campaign put up many a black teacher and rented to them as well since he could provide affordable housing. (This was true in 1982.)

It was solely the Harriet Scott rental and sensational news stories planted largely by school employees and the Superintendent before Mr. Lee was ever afforded the dignity and privacy

of a grievance process, that one could surmise created "serious detriment" to the School System, however, it was totally created by the School System's employees fueled by jealousy and an over zealous press crooning to a cooperative and pressured Superintendent giving nearly daily briefings on the war against Mr. Lee.

In Perry v. Sinderman, 408 U.S. 593, 601, 92 S. Ct. 2694, 2699 33 L. Ed. 2d 570 (1971), this Court has held that a continuing contract of employment is a "property interest". It can only be deprived for good cause. The Fourth Circuit has so agreed. Wooten v. Clifton Forge School Board, 655 F.2d 552, at 554, citing Perry v. Sinderman.

In Wooten, the Fourth Circuit reasoned that the mere assignment of a teacher was a deprivation of property

interest, viz., that one's liberty interest in his reputation would be seriously damaged on being discharged and his charges are publicly disclosed, citing as authority, Board of Regents v. Roth, 408 U.S. 564, 569-70, 92 S. Ct. 2701, 2705, 33 L. Ed. 2d 548 (1972). Yet, It turns a deaf ear to Mr. Lee's claims and right to a trial on disputed facts by affirming summary judgment in violation of its prior rulings on summary judgment. Summary judgment "should be granted only where it is perfectly clear that no issue of fact is controverted." West v. Costen, 558 F. Supp. 564 (W.D. Va. 1983), citing Stevens v. Howard D. Johnson Co., 181 F.2d 390 at 394 (4th Cir. 1950)

Before Mr. Lee was ever formally charged or was allowed the privacy and dignity of a formal grievance panel

hearing within the School System, he was the victim of a local witch-hunt through the press and throughout the School System. A massive travesty of unfounded news leaks, untested innuendos, blatant character assassination, and malicious destruction of his basic rights of liberty and personal and professional reputation promoted by those within the School System within their sanctuary and without proceeded unabated. He was vilified and portrayed publicly as a despicable public servant violating "the public trust" (The Daily Progress, September 24, 1982, App., pg. 71.) and finally before he even began his defense legally and officially before a grievance panel, to his community with the photograph blazened on the paper, it was publicly announced "School Official Dismissed". (The Daily Progress, October

6, 1982.) (App., pg. 66.)

Therefore, to overcome the School Board's statutory reason seized by the District Court of "good and just cause" to dismiss Mr. Lee, the School Board would have to overcome an evidentiary proof that the firing was motivated by an arbitrary or capricious reasoning wholly unsupported by fact and, as the Sixth Circuit has held consistent with this Court's ruling, to overcome "that the decision was motivated by bad faith or ill will", a trial is necessary. Stevens v. Hunt, 646 F.2d 1168, 1178 (1981). This Court, in accord, has held that liberty interest under the Fourteenth Amendment are subject to the protections of due process "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him."

Board of Regents v. Roth, 408 U.S. 564, 573 (1972). Mr. Lee has been deprived of his right to fairness guaranteed by the substantive due process clause.

Even in Gwathmey v. Atkinson, 447 F. Supp. 1113, at 1117 (1976) cited by the District Court, that Fourth Circuit District Court wrote in its opinion concerning the School Board's discretion, "Discretion, however, means exercise of judgment, not bias or capriciousness." The First Circuit noted in Drown v. Portsmouth School District, 435 F.2d 1182, 1187 (1971), that "bad faith may rise to a constitutional level in which case the federal courts are available."

This Court has held to meet the requirement of substantive due process that decision makers may not act in a manner which is "wholly arbitrary

or irrational." Martinez v. California, 444 U.S. 227, 282 100 S. Ct. 553, 557 (1980). In Martinez, this Court noted "The touchstone of due process is protection of the individual against arbitrary action of government." Citing Dent v. West. Va., 129 U.S. 114, 123, 9 S. Ct. 223 (1889).

To illustrate for purposes of this petition that Mr. Lee is entitled to vindication of his reputation and restoration of his substantive due process right, the following is true.

Miss Ella May, one grievance panel member, reveals in pre-trial deposition testimony the probability the grievance panel process was tainted ab initio. (App., pgs. 41-43.) Miss May intimated that panel member Mrs. Garrison voted against Mr. Lee solely because her job depended on her doing so.

> (Miss May on Direct)
> [T]his was Mrs. Garrison. David [David Landin, Panel Chairman], you've got to help me, my job is riding on this - in other words, what it was saying was that, my job is related to this.

Miss May, a tenured teacher of long standing went on to say "I didn't think the decision was a fair one." She revealed Mrs. Garrison played tennis with Mr. Landin's wife and up to the final vote, Mr. Landin was siding with Miss May.

> (Miss May on Direct)
> "Because he had voted the same thing I had voted all the way through ... Mrs. Garrison asked him ... can you agree with that ... So since there was no change, I assumed that the final draft would be like all the rest had been on the issue, but it had been changed. And so many things had been changed, until it kind of upset me.

Mrs. Garrison, visiting many of the schools within the division, revealed in her pre-trial deposition (App., pg.

43.) that within the School System before her appointment to the panel by Superintendent Gutierrez, the atmosphere toward Mr. Lee due to the "notoriety" of Lee's newspaper articles within the school was distressful.

> "I mean people were distressed by just the notoriety and the - and having things in the paper. What do you think about it; what do you know from central office ... I just know basically what we all know from the paper."

Asked if a lot of the school employees were upset with the "notoriety of it", she responded, "I think anybody would be." Superintendent Gutierrez in selecting her to be a panel member, took her to his office alone and privately and told her in an apparent bravado and patriotic tone that she was selected as the Albemarle County School System's representative. Mrs. Garrison testified she was brand new in the system.

Not only was the "notoriety" of the newspaper articles poisoning the waters of the fairness, impartiality, non-emotional mandate of a grievance hearing, Mr. Lee had to contend with past "jealousies or differences of opinion" and "resistance" by the school employees for his role as Chairman of the Minority Task Force. (App., pg. 47.) Even though Mr. Lee and his Superintendent, who had praised him lavishly for a job well done, were together when the Minority Task Force made its recommendations (App., pg. 48.) to the School Board approved May 10, 1982 in a public hearing, once the newspaper articles came out, Board members including Mrs. Haden, Chairperson, were "hopping made about the whole thing." (App., pg. 50.) The School Board, "embarrassed" by the sensational news,

on June 26, 1983 in their letter dismissal having commended Mr. Lee's Minority Task Force as a job well done, the Superintendent having heaped lavish praise upon him, cited errors post facto that "endangered the success of the Minority Task Force's program"; Mr. Lee had improperly hired or misplaced at least one black teacher, totally contradicting their May 10, 1982 public hearing approval, the praise and commendation, and adding insult to injury, the School Board never identified who was the at least one teacher he improperly hired or misplaced.

Looking at the grievance panel's opinion (App., pg. 36.), no where do they conclude Mr. Lee improperly hired or misplaced a teacher nor that be "endangered" the program, citing a complaint to his independent judgment

which he had been given, viz., the final authority to offer contracts. Their majority recommendation to dismiss rested "unanimously" on his outside personal business conducted on a regular basis "to a lesser or greater degree" known by the School System.

In the Eighth Circuit in the case of Fisher v. Snyder, 476 F.2d 375 (1973), a teacher's contract was terminated because of accusations that she was having overnight guests providing for an inference of sexual misconduct. She was fired to maintain the integrity of the public school system. The Eighth Circuit ruled her firing was constitutionally impermissible and violative of the substantive due process clause under the Fourteenth Amendment. In making the decision, the Eighth Circuit noted Mrs. Fisher, who was afforded

a grievance hearing just as Mr. Lee had and had not concealed her boarders, nonetheless, the given reasons by the School Board and Superintendent to dismiss her were deemed to be arbitrary and capricious.

It is the simplest principle of due process, substantive due process, that a "fair trial in a fair tribunal is a basic requirement of due process." In Re Murchinson, 349 U.S. 133, 136, 99 L. Ed. 1942 (1955). No less a standard applies to the grievance panel and the School Board.

Mr. Lee's dismissal was a prejudicial and biased decision. For the reasons and law stated above, a writ to review should be granted.

TWO

In granting the Writ, to remand for trial should include a decision reversing the decision below that immunity applies in the instant case.

Immunity is not applicable under the Eleventh Amendment where allegations and proof of bad faith exist. In addition, a suit by a citizen of one state against another state in the Courts of the United States is prohibited by the plain text of the Eleventh Amendment to the constitution. In Beers v Arkansas, 61 U.S. 527, 15 L.Ed. 99, 992 (1858), Chief Justice Taney wrote:

> It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals or by another state."

Despite the Eleventh Amendment, a state

may be sued by its own consent. Hans v. Louisiana, 134 U.S. 1, 22 L.Ed. 842, 10 S.Ct. 504 (1980).

By Virginia Code Section 22.1-71, Virginia has clearly waived such privilege, as against this action stemming from breach of contract, by declaring the defendant School Board to be "a body corporate ... vested with all the powers and charged with all the duties, obligations and responsibilities imposed upon school boards by law and [which] may sue, be sued, contract, be contracted with" etc. The holding in Kellam v. School Board, 202 Va. 252, 117 S.E.2d 96 (1960), that this statute does not affect the School Board's governmental immunity for tortuous personal injury, emphasizes the clear waiver of immunity from suit arising from contract.

In Pennhurst State School & Hospital

v. Halderman, ____ U.S. ____ 97 L.Ed.2d 67 (1984), the United States Supreme Court held only that a federal court may not award injunctive relief against state officials on the basis of state law. In Fitzpatrick v. Bitzer, 427 U.S. 445, 49 L.Ed.2d 614, 96 S.Ct. 2666, the Court puts in perspective the Fourteenth Amendment and the "appropriate legislation" for its enforcement and their effect upon the Eleventh Amendment and the principles of state sovereignty, viz:

> "we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, see Hans v. Louisiana, 134 U.S. 1, 33 L.Ed. 842, 10 S.Ct. 504 (1890), are necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate Legislations" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority.

As to the Eleventh Amendment immunity argument, the controlling issue is "good faith". Plaintiff has alleged "bad faith" among other charges leveled against the defendants and the School Board. This being an evidentiary issue on disputes of fact, a motion for summary judgment cannot be granted.

The Supreme Court of the United States has indicated that dismissal in a §1983 action is not to be granted unless "it appears beyond doubt that the plaintiff cannot prove no set of facts in support of his claim which would entitle him to relief." Haines v. Kerner, 404 U.S. 519 (1972), reh. den. 405 U.S. 948. In accord, Edwards v. Duncan, 335 F.2d 993 (4th Cir. 1966). The plaintiff as a matter of law has met that burden. The Supreme Court

has held that in an action brought against a public official whose position might entitle him to immunity if he acted in good faith, a plaintiff need not even allege bad faith in order to state a claim for relief. Monell v. Department of Social Services, 436 U.S. 658. As in all actions brought under §1983, the plaintiff must allege only that some person has deprived him of a federal right, and that person acted under colour of state law. Gomez v. Toledo, 446 U.S. 635 (1980). Clearly, Mr. Lee has adequately accomplished these requirements in his Complaint.

Finally, immunity and the Eleventh Amendment do not apply to the instant cause as the defendants have been sued in their official and individual capacities. Brandon v. Holt, 469 ____ U.S. ----, 83, L.Ed.2d 878, (Opinion

§83-1622, decided January 21, 1985 involving 42 U.S.C. §1983). See also and the Court citing Owen v. City of Independence, 445 U.S. 622, 63 L.2d 673, 100 S.Ct. 1398 (1980). Not even qualified immunity applies even where it involves "good faith". Id. L.Ed. at page 886. Moreover, the plaintiff has not only alleged "bad faith", but that his firing was motivated by malice and hatred. And for these reasons, a writ should be granted.

THREE

To decide whether summary judgment was proper in this case on a racial discrimination claim when a prima facie case was alleged in the Complaint.

The decision of Moore v. City of Charlotte, N.C., 754 F.2d 110 (4th Cir. 1985) is supportive of Lee's discrimination complaint and by the

criteria set forth in that case, the decision in this case is in conflict with this prior decision although the Fourth Circuit opined Mr. Lee had not met the criteria of this case.

The Fourth Circuit Panel set forth in Moore that "The purpose of the prima facie requirement is therefore served and the requirement met upon a showing (1) that plaintiff engaged in prohibited conduct similar to that of a person of another race, color, etc ... (2) that disciplinary measures enforce against the plaintiff were more severe than those enforced against the other person."

In the first instance, Moore was allowed to go to trial, Lee has been denied a trial. In the second instance, by the criteria of Moore, Lee has amply set forth a prima facie case and material facts have been overlooked.

In his Complaint, Lee pleaded unequivocally as follows:

> ¶27. Plaintiff believes and alleges that no caucasian employee has been tried or dismissed for reasons similar to those for which plaintiff was dismissed although in recent history or the school system, there have been Caucasian employee who openly engaged in forbidden or unforbidden activities and yet were not similarly scorned or treated in the manner that plaintiff was treated; and plaintiff believes and alleges that he was dismissed solely because of his race.

In support of his pleading, Lee obtained pre-trial deposition testimony and affidavits in support of his claim. The Superintendent who dismissed Lee disclosed in pre-trial deposition the School System still had latent racism within it which was confirmed by the pre-trial deposition of Howard A. Collins, the School System's Director of Vocational Education. He was specifically asked if he agreed with Dr. Gutierrez's

assessment and he responded "yes".

To dismiss Lee's case brought pursuant to §§ 1981, 1983, and 1985 places this decision in clear conflict with Moore v. City of Charlotte, N.C., 754 F.2d 1110 (4th Cir. 1985). Mr. Lee's record is replete with demonstrations of controverted facts that go to the issue of discrimination and motivations for his dismissal.

In the Fifth Circuit, a trial court improperly dismissed a black professor's suit in which he alleged that the failure of the university's president to provide him with responsibilities commensurate with his title and his later demotion to a teaching position were caused by racial animus where the record demonstrated that genuine issues of fact existed with respect to the quality of the plaintiff's performance as Dean

of University Relations, the motivation of university officials in assigning responsibilities and salary to the plaintiff, and the reasons of university officials for their decision to terminate the plaintiff's tenure as dean. John v. State of Louisiana (Bd. of Trustees for State Colleges and Universities) (C.A. 5, La. 1985), 757 F.2d 698.

Mr. Lee was dismissed for purportedly endangering a program for which he was lavishly praised and commended by the Board and Superintendent alike. Their motivations could only be suspect by that blatant contradiction.

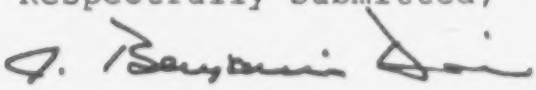
For the reasons stated above, a writ should be granted.

CONCLUSION

The bias, arbitrary, capricious decision of the School Board should

be subject to a trial on the merits as well as Mr. Lee's discrimination claim. The decision of the Fourth Circuit Panel overlooks material facts and is in conflict with the case law of this Circuit and the United States Supreme Court.

Respectfully Submitted,



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